83428-8

No. _____

SUPREME COURT OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION II
No. 37327-1-II

RIZWANA RAHMAN

Appellant,

v.

STATE OF WASHINGTON

Respondent

v.

MOHAMMAD SHAHIDUR RAHMAN, individually and
MOHAMMAD SHAHIDUR RAHMAN and RIZWANA RAHMAN,
as a marital community

Third Party Defendants

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

The petitioner is the State of Washington, respondent at the court of appeals.

II. COURT OF APPEALS DECISION

The state seeks review of the decision of the Washington Court of Appeals, Division Two, in *Rahman v. State of Washington*, No. 37327-1-II, slip op. (Wash. May 27, 2009). The decision was filed on May 27, 2009, and a Motion for Reconsideration was denied on June 25, 2009. (The slip opinion is in the Appendix (App.) at A-1 through 15 and the order denying reconsideration is in the App. at B-1).

III. ISSUES PRESENTED FOR REVIEW

Until the court of appeals' decision in this case, the law was well settled that public employees were prohibited from using state resources for their private benefit. This included use of state vehicles. This court's precedent has long established that an employer is not vicariously liable to passengers allowed to ride in the employer's vehicle without the authority of the employer. Division Two held exactly opposite, ruling that the state was liable to a passenger in a state vehicle, whose husband allowed her to ride as a passenger in direct violation of agency policy, state policy, and statute. This case raises the following issues:

1. Is review warranted under RAP 13.4(b)(1) because the court of appeals' decision directly conflicts with decisions of this court that hold an employer is not liable for injuries suffered by an unauthorized passenger?

2. Is review warranted under RAP 13.4(b)(2) because the court of appeals relied on a California case applying an enterprise liability theory that is in direct conflict with all Washington Court of Appeals decisions that have considered this theory?

3. Is review warranted under RAP 13.4(b)(4) because the court of appeals' decision leaves state and local governments with no meaningful way to control their liability for unauthorized passengers in public vehicles?

4. Is review warranted under RAP 13.4(b)(4) because the court of appeals interpreted RCW 42.52.160, the State Ethics Act, in a manner that is contrary to the plain language of the statute and to the public policy supporting the statute?

IV. STATEMENT OF THE CASE

1. Factual Background

Mr. Rahman was employed by the Department of Ecology as a temporary employee for three months from June 1 to August 31, 2005. CP at 164. When he began his employment, he was given a new

employee orientation. CP at 147-48. As part of this orientation, Mr. Rahman reviewed and signed the New Employee Orientation Checklist which includes the use of state vehicles. CP at 151, 167. He was directed to review the agency's policies. CP at 148.

Department of Ecology Policy 11-10 covers the use of Ecology vehicles. CP at 155-57. It provides: "Ecology vehicles are not to be used for personal trips unrelated to the state business for which they were assigned, nor to transport passengers that are not on official state business." CP at 155.

In addition to Ecology's policy, the State of Washington has a policy that covers all executive, judicial, and legislative employees of the state. CP at 176. Every state employee must comply with these policies. CP at 176. Mr. Rahman's actions were expressly forbidden by these policies. "When a state-owned or leased motor vehicle is being operated, any person exercising control over and/or operating the vehicle is expressly prohibited from engaging in the transportation of unauthorized passengers." State Administrative and Accounting Manual (SAAM) Ch. 12.30.20.a. CP at 139.

Mohammad Rahman, without authorization and without the knowledge of his supervisor, took his wife with him on an official state business trip. CP at 166. Mr. Rahman did not request authorization from

his supervisor and would not have been given authorization if he had asked. CP at 187. Following the accident he received a letter of reprimand from his supervisor for taking an unauthorized passenger in a state vehicle. CP at 174. This letter notes that Rahman had reviewed Ecology's policy prohibiting the use of state vehicles. CP at 174.

Mr. Rahman's wife was injured when the state vehicle Mr. Rahman was driving left the road. Ms. Rahman sued the state for damages associated with her injuries. CP at 7.

2. Procedural Background

The parties filed cross motions for summary judgment in the superior court. CP at 99, 137. The State argued that the case be dismissed because it was not liable as a matter of law. CP at 137. The trial judge granted the State's motion. CP at 217. The court of appeals reversed and remanded for summary judgment on liability to be entered in favor of Rahman. App. A at 14-15. The State's motion to reconsider was denied on June 25, 2009. App. B.

V. ARGUMENT—WHY REVIEW SHOULD BE GRANTED

This case is appropriate for review under RAP 13.4(b)(1), (b)(2), and (b)(4). Division Two's decision in this case directly conflicts with two prior decisions of this court. The decision relies on a California case which was decided under an "enterprise theory" of liability which has

been directly rejected by all court of appeals decisions in Washington that have considered it. Finally, the decision involves two issues of substantial public interest: it deprives state and local governments of any meaningful way to control liability for unauthorized passengers in public vehicles; and it interprets the State Ethics Act in a manner contrary to its plain language, exposing state and local governments to liability for prohibited use of public resources and potentially resulting in the misapplication of the statute to other conduct.

A. The Court Of Appeals' Decision Conflicts With Two Decisions of This Court (RAP 13.4(b)(1))

This court decided the issue presented in this case in two earlier cases, *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917) and *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 P. 491 (1917).

In *McQueen*, a delivery driver, while making deliveries, gave Ms. McQueen a ride across the street on the running board of his employer's vehicle. She fell off, was injured, and sued the driver's employer. This court held unanimously that the driver was not acting within the scope of his employment, and the employer therefore was not liable. "In inviting the girls to ride upon the truck, [the driver] was engaged in furthering his own pleasure, and not in furthering his master's business." *McQueen*, 97 Wash. at 390. "[T]he act complained of must

have been done while the servant was engaged in doing some act under authority from his master; not that, while engaged in the act, he is employed in the masters business; but the act must have been in the furtherance of the master's business . . . ." *Id.* at 388. "In extending this invitation [the driver] was acting without reference to the business in which he was employed. It was an independent and private purpose of his own contributing to his pleasure but not to his service." *Id.* at 390.

This court reached the same result in *Gruber* under different facts. In *Gruber*, the employee was the driver of a moving truck. He allowed Gruber to ride in the back of the truck with his household goods. This court found that the driver did not have his employer's authority to allow Gruber to ride upon the truck and therefore the employer was not liable for Gruber's injury as a matter of law. *Gruber*, 96 Wash. at 547-49.

In this decision, Division Two attempted to distinguish both cases. The distinctions found by the court of appeals fail to recognize the actual reasoning and rationale of this court's decisions and therefore yield an absurd and illogical interpretation of this court's precedent.

The opinion of Division Two distinguished *McQueen* because this court did not "clearly state" that the driver was in route to another delivery. *Rahman* at 9 n.4. This is an invalid distinction. In *McQueen*, this court assumed that the driver of the truck invited the women to "ride

with him while delivering merchandise for [the employer]." *McQueen*, 97 Wash. at 389-90. Division Two's interpretation of *McQueen* overlooks and misapprehends the reasoning and holding of that case. This court did not analyze whether the short trip across the street removed the driver from the scope of employment. This court instead held that the unauthorized *invitation* itself was the act of taking the driver out of the course of employment. "In extending this invitation [the driver] was acting without any reference to the business in which he was employed. It was an independent and private purpose of his own contributing to his pleasure, but not to his service." *McQueen*, 97 Wash. at 390. Substitute "Mr. Rahman" for "the driver" and the cases are substantively identical.

Division Two's attempt to distinguish this court's decision in *Gruber* is similarly transparent. The court of appeals found that *Gruber* was "inapposite" because it did not use the term "respondeat superior" or "scope of employment." The *Gruber* court clearly was presented with an issue requiring an analysis of respondeat superior and scope of employment, regardless of whether those specific terms were used. The plaintiff in *Gruber* attempted to hold the employer liable for the negligence of his employee. The employer's defense to the claim was "that the driver had no real or apparent authority" to consent to Gruber riding on the truck. *Gruber*, 96 Wash. at 546. Indeed, in *McQueen*,

decided a mere six weeks after the *Gruber* decision, this court described the *Gruber* decision as having determined that the driver "was not acting within the scope of his employment." *McQueen*, 97 Wash. at 390. Division Two thus rejected this court's contemporaneous construction of its own decision.

The court of appeals also distinguished *Gruber* because the vehicle in *Gruber* was not meant for passengers in its cargo area. *Rahman* at 8. Nothing in the *Gruber* decision turned on that fact. Rather, that fact was noted in *Gruber* simply as additional evidence that the employee was acting outside of his authority. *Gruber*, 96 Wash. at 547. Under the court of appeals' interpretation of *Gruber*, the state would not be liable for Ms. Rahman's injuries if she had been riding in the trunk but is liable if she is riding in the passenger compartment. This distinction is illogical, contrary to the reasoning and analysis in both *Gruber* and *McQueen*, and immaterial to the real question presented—whether Mr. Rahman was acting within his scope of employment.

Finally, the court of appeals distinguished *Gruber* because the parties in *Gruber* had contracted to carry cargo, not passengers. This distinction ignores the rational of the decision. If the parties had contracted for passengers and the plaintiffs were passengers within the terms of the contract, there would be no question as to whether the driver

had authority to give a passenger a ride. The state, in this case, had contracted for neither passengers nor cargo. Under this decision, the state would not be liable for the injuries to Ms. Rahman if it had contracted for Mr. Rahman to carry supplies in a state car, but is liable if there is no such contract. Again, this distinction disregards the underlying holding in *Gruber*—that an employer is not liable to an unauthorized passenger.

Contrary to Division Two's apparent analysis, the rule in *McQueen* and *Gruber* remains the law in Washington. The underlying reasoning in both *McQueen* and *Gruber* is that carrying an unauthorized passenger in those cases did not, in any way, further the employer's business. The court of appeals mistakenly relied on cases in which the act of the employee benefited the employer. In such cases, the result may be different. In *Poundstone v. Whitney*, 189 Wash. 494, 65 P.2d 1261 (1937), a mechanic for a car dealership was involved in an accident on his way to pick up a potential customer. Although driving the car was outside the mechanic's express authorization, this court found the employer was liable. Citing *McQueen*, this court stated, "[T]he employer is liable if the act complained of . . . *indirectly contributed to the furtherance of the business of the employer.*" *Poundstone*, 189 Wash. at 499. (emphasis added). In *Poundstone*, unlike this case, the employee's unauthorized action furthered the interest of his employer's business.

This court applied this analysis in *McNew v. Puget Sound Pulp & Timber, Co.*, 37 Wn.2d 495, 498, 224 P.2d 627 (1950). In *McNew*, the employee was employed at a logging camp as the head cook. *Id.* at 496. Every other weekend he would drive to visit his family in Mukilteo. *Id.* He frequently would purchase supplies on his trip home. *Id.* He had done so on the trip at issue in the case and, with the supplies in his car, he was involved in an accident on his way back to the camp. *Id.* This court said, "the employer will be held responsible unless it clearly appears that the employee could not have been directly or indirectly serving his employer . . . and if the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is subject to liability if the act otherwise is within the service." *Id.* at 497-98. Nevertheless, this court determined that the employee's trip home was to serve his own purpose. Just as the invitation in *McQueen* was for the employee's own purpose, the employee's trip in *McNew* was not in furtherance of the employer's business and the employer was not liable. *Id.* at 499. *McNew* does not affect the rule stated in *McQueen*.

Division Two's decision also refers to two other decisions of this court: *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949), and *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986). Both of these cases involved employees found to be in furtherance of their employer's

business. In *Smith*, the employee was returning his employer's truck to his employer's business even though instructed not to drive that particular evening. *Smith*, 105 Wn.2d at 624-25. In *Dickinson*, the employee was attending his employer's banquet and became intoxicated. *Dickinson*, 105 Wn.2d at 469-70.

None of this court's subsequent decisions have altered the rule in *McQueen* and *Gruber* that an employee who invites an unauthorized passenger to ride in his employer's vehicle, and in so doing does not further his employer's business, is outside the scope of his employment. Division Two's decision directly conflicts with this court's decisions in *McQueen* and *Gruber*. Accordingly, the state requests this court to accept review pursuant to RAP 13.4(b)(1).

B. Division Two's Decision Relies On A California Theory Of Liability That Has Been Rejected By All Other Court Of Appeals' Decisions That Have Considered The Issue And Which Is Contrary This Court's Decisions

The Division Two's decision relied upon *Perez v. Van Groningen & Sons, Inc.*, 41 Cal.3d 962, 719 P.2d 676 (1986). This case was not cited or argued to the court by either of the parties.

California courts—and in particular the *Perez* decision—apply the "enterprise liability" doctrine in determining vicarious liability for the acts of employees. This doctrine is based on a public policy decision that the

enterprise should bear all the risk created by the operation of the enterprise. This is not the law in Washington, as demonstrated by the *McQueen* and *Gruber* cases. *McQueen*, while not specifically addressing "enterprise liability", specifically rejected the concept. "[T]he act complained of must have been done while the servant was engaged in doing some act under authority from his master; *not that, while engaged in the act, he is employed in the master's business*; but the act must have been in furtherance of the master's business . . . ." *McQueen*, 97 Wash. at 388 (emphasis added).

Enterprise liability has repeatedly been rejected by Division One. In *Thompson v. Everett Clinic*, 71 Wn. App. 548, 553-34, 860 P.2d 1054 (1993), Division One determined that a doctor who sexually molested the plaintiff was not within the scope of his employment even though the molestation occurred while he was working at the clinic. The court found that the intentional tortious acts of the doctor were not within the scope of his employment and the clinic was not vicariously liable. *Id.* at 553. The plaintiff requested the court to adopt an enterprise liability approach which would make the clinic liable for the inherent risk of employer's enterprise. *Id.* The court rejected this request and noted that it had previously specifically rejected enterprise liability before in *Kuehn v. White*, 24 Wn. App. 274, 280, 600 P.2d 679 (1979), and *Hayes v. Far West Servs., Inc.*,

50 Wn. App. 505, 506, 749 P.2d 178, *review denied*, 110 Wn.2d 1031 (1988).[1]

Division One has rejected the enterprise theory in four decisions. Division Two's decision in this case is in conflict with these decisions. Accordingly, the State requests this court to accept review pursuant to RAP 13.4(b)(2).

C. Division Two's Decision Leaves State And Local Governments With No Meaningful Way To Control Their Liability For Unauthorized Passengers In Public Vehicles (RAP 13.4(b)(4))

The decision of the court of appeals impacts a substantial public interest. Even where, as here, an employer strictly prohibits its employees from transporting unauthorized passengers, carefully informs each employee of the prohibition, and acts at all times to consistently enforce the strict prohibition, Division Two's decision allows an errant employee to unilaterally and without employer authorization create employer liability. While nothing in the decision limits its application only to government employers, state and local governments are left with no meaningful way to control their liability for passengers in public vehicles if the decision stands as precedent. The State requests this court to accept review pursuant to RAP 13.4(b)(4).

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[1] Division One has also specifically considered and rejected the *Perez* case in an unpublished opinion. *See LaValley v. Ritchie*, 95 Wn. App. 1052, 1999 WL 359098 (May 24, 1999), *review denied*, 139 Wn.2d 1016, 994 P.2d 844 (2000).

D. The Decision Ignores The Plain Language Of The State Ethics Statute, RCW 42.52.160, Interpreting The Prohibition On Use Of Public Resources For Personal Gain To Require Waste of Public Resources (RAP 13.4(b)(4))

The court of appeals declined to consider the State Ethics Statute, RCW 42.52.160 because it was not cited in the trial court.[2] The court, however, nevertheless discussed RCW 42.52.160 in a footnote. That discussion erroneously interprets RCW 42.52.160 contrary to the plain language of the statute, creating an issue of substantial public interest through its misinterpretation of a core prohibition on the use of public resources for personal gain. Review is warranted under RAP 13.4(b)(4).

RCW 42.52.160(1) provides that "No state officer or state employee may employ or *use* any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another." (Emphasis added.) Division Two opined that the "purpose of the statute is to ensure that state employees 'do not *waste* official resources on personal business,'" in misplaced reliance on *Clawson v. Grays Harbor College Dist. No. 2*, 148 Wn.2d 528, 61 P.3d 1130 (2003) (emphasis added). App. A at 14. The statute prohibits "use" of public

[2] This was an error. *See Ellis v. City of Seattle* 142 Wn.2d 450, 460 n.3, 13 P.3d 1065 (2000). ("The Court of Appeals' approach seems misguided. . . . There is no requirement to list every statute, code, or case brought to the attention of the trial court. Nor should there be, as any court is entitled to consult the law in its review of an issue, whether or not a party has cited that law.")

resources for private benefit. It does not prohibit only those uses that may "waste" public resources.

Clawson appears to be the only case in Washington that has cited RCW 42.52.160, but RCW 42.52.160 was not at issue in *Clawson*. *Clawson* concerned the state's Minimum Wage Act. RCW 42.52.160 was cited, along with other statutes and the constitution, as illustrative of the requirement of public accountability. "These laws focus on paying employees only for time worked and ensuring that employees do not waste official resources on personal business." *Clawson,* 148 Wn.2d at 545. *Clawson* did not, because it was not an issue in the case, analyze or discuss what the court meant by the term "waste." It appears, at best, a misnomer that the *Clawson* court used the term "waste" instead of "use." *Clawson* cannot properly be considered as authority for interpreting RCW 42.52.160 in a manner that is contrary to its clear terms.

By implying that carrying an unauthorized passenger is not a violation of RCW 42.52.160 because it is not "waste,"[3] Division Two has created the possibility of a grave misapplication of RCW 42.52.160. Under this reasoning, a state employee could manage her personal business on a state-owned computer and state-owned telephone during her

[3] Even if one ignores the effect on gas mileage through the extra weight, the additional risk exposure with its added costs of liability for unauthorized passengers and the very real liability payment contemplated in this case would appear to qualify as a "waste" of public resources.

lunch hour and breaks because this use does not "waste" resources. An employee could use a state computer for inappropriate internet access during breaks or lunch. Under the court of appeals' analysis, as long as the route is the same, a state employee, driving a state car, could bring his or her entire family to another city for sightseeing or to transport merchandise and conduct personal business. This misinterpretation of the statute portends a serious and fundamental change in the law governing the conduct of public employees that will substantially affect the public interest of ensuring that public resources are not misappropriated for private benefit. The State requests this court to accept review pursuant to RAP 13.4(b)(4).

VI. CONCLUSION

The State of Washington respectfully requests that this petition be granted. RAP 13.4(b)(1), (2) and (4).

RESPECTFULLY SUBMITTED this 23rd day of July, 2009.

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PROOF OF SERVICE

I certify that I served a copy of *Petition for Review* on all parties or their counsel of record on the date below via messenger, as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 24th day of July, 2009, at Tumwater, Washington.

CYNTHIA A. MEYER

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RIZWANA RAHMAN, Appellant, v. STATE OF WASHINGTON, Respondent, v. MOHAMMAD SHAHIDUR RAHMAN, individually and MOHAMMAD SHAHIDUR RAHMAN and RIZWANA RAHMAN, as a marital community, Third Party Defendants.	No. 37327-1-II PUBLISHED OPINION

BRIDGEWATER, J. — Rizwana Rahman was injured while riding in a state vehicle as an unauthorized passenger. She filed suit against the State of Washington for damages associated with her injuries. The trial court summarily dismissed her complaint. We hold that as a matter of law the State is vicariously liable for Rizwana's injuries under the doctrine of respondeat superior. We reverse and remand for further proceedings.

FACTS

Mohammad Shahidur Rahman was employed as a summer intern by the Washington State Department of Ecology (Department) from June 1 to August 31, 2005. He was assigned to

the dam safety office. His job duties included assisting with drafting, performing engineering calculations and basic data analysis, accompanying senior engineers on inspections, and helping to write reports.

When Mohammad[1] was hired, he was required to review Department policies including the use of state vehicles. Department of Ecology Policy 11-10 covers the operation of Ecology vehicles. It provides: "Ecology vehicles are not to be used for personal trips unrelated to the state business for which they were assigned, nor to transport passengers that are not on official state business." CP at 155.

Mohammad had been working for about two months when his supervisor, Douglas Johnson, assigned him to travel for an inspection. Mohammad was to drive to Spokane in order to meet a Department hydrologist with whom he would inspect a construction site. Johnson authorized Mohammad to sign out a Department vehicle overnight so that he could leave directly for Spokane the next morning.

The night before Mohammad's scheduled business trip, his wife Rizwana felt ill. She was also lonely and wanted to go with her husband the next day. The couple had been recently married and she had just moved to Washington. Mohammad agreed that Rizwana could ride with him to Spokane the next day. They planned for her to stay in the car during the site visit, and then they would drive directly home so Mohammad could be back at his office the following day. Mohammad did not inform anyone at the Department that Rizwana was going to accompany him.

[1] We refer to the Rahmans by their first names in order to distinguish them.

Mohammad and Rizwana left Olympia about 5 AM on July 26. It was dark and drizzling when they passed Tiger Summit on Highway 18. As Mohammad drove downhill, he failed to negotiate a curve. The vehicle left the roadway, struck a tree, and rolled two or three times. Rizwana was badly injured.

Mohammad called his supervisor from the scene of the accident, explained what had happened, and said that his wife was badly injured. Prior to that call, Johnson did not know that Mohammad's wife was with him. Johnson instructed Mohammad to attend to his wife and tell the state patrol officer at the scene that he worked for the Department. Mohammad later received a letter of reprimand for violating the Department policy that prohibits transporting passengers who are not on official business.

Rizwana filed a complaint for personal injuries in Thurston County Superior Court on June 16, 2006, naming the State of Washington and Mohammad as defendants. The complaint was later amended to name the State of Washington as the sole defendant.

The State filed a third-party complaint, denying its liability and asserting that to the extent it might be found liable for Mohammad's actions, it was entitled to full indemnification from Mohammad and full or partial indemnification from the marital community of Mohammad and Rizwana for any damages, costs, or fees assessed against it.

Rizwana moved for partial summary judgment, seeking an order determining that the State was vicariously liable under the doctrine of respondeat superior for Mohammad's negligence in causing the accident. The State filed a cross-motion, asserting that it was not liable for Rizwana's injuries because, as a matter of law, Mohammad's use of a state vehicle to transport his wife was outside the scope of his employment.

Argument was heard before Thurston County Superior Court Judge Anne Hirsch on March 16, 2007. Summary judgment was denied pending discovery as to whether the State had policies or procedures for authorizing non-employee passengers.

The parties later renewed their motions. Argument was heard before Thurston County Superior Court Judge Chris Wickham on January 25, 2008. The material facts were undisputed:

> Everyone agrees that [Mohammad] was working for the State of Washington, that there was a policy that prevented [him] from having a passenger in a state vehicle on state business. Everyone agrees that [he] took his wife on a trip east of the mountains, in violation of the policy. She was injured in an automobile accident . . . .
>
> . . . .
>
> And everyone agrees that [Mohammad's] operation of the vehicle was negligent.

RP (Jan. 25, 2008) at 5.

The court framed the question at issue as "whether the State has a duty to [Rizwana] under the Doctrine of Respondeat Superior." RP (Jan. 25, 2008) at 5. The court granted the State's motion, ruling that "there is no liability under the theory of Respondeat Superior under these circumstances." RP (Jan. 25, 2008) at 18. The court noted that there is no Washington case law directly on point and relied in part on *Restatement (Second) of Agency* § 242 (1958) to determine that the circumstance presented warranted special treatment and that general principles of respondeat superior do not apply in this context. Rizwana's appeal to this court followed.

ANALYSIS

In reviewing orders on summary judgment, this court engages in the same inquiry as the trial court. *Huff v. Budbill*, 141 Wn.2d 1, 7, 1 P.3d 1138 (2000). Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Huff*, 141 Wn.2d at 7.

Rizwana argues that because Mohammad was performing his job functions at the express direction of his employer when the accident occurred, the State is vicariously liable for her injuries as a matter of law under the doctrine of respondeat superior. Under this doctrine, an employer may be liable for its employee's negligence in causing injuries to third persons if the employee was within the "scope of employment" at the time of the occurrence. *Breedlove v. Stout*, 104 Wn. App. 67, 69, 14 P.3d 897 (2001). The test for determining if an employee is acting in the scope of employment is "whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, or by specific direction of his employer." *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 573, 320 P.2d 311 (1958). While determining the scope of employment is normally a jury question, where there can be only one reasonable inference from the undisputed facts, the issue may be resolved at summary judgment. *Breedlove*, 104 Wn. App. at 70 n.5; *Strachan v. Kitsap County*, 27 Wn. App. 271, 274-275, 616 P.2d 1251, *review denied*, 94 Wn.2d 1025 (1980).

Our Supreme Court has further explained:

> The general trend of authority is in the direction of holding that, where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business the employee was actually engaged in when a third person was injured, and the employer will be held responsible unless it clearly appears that the

> employee could not have been directly or indirectly serving his employer; also the fact that the predominant motive of the employee is to benefit himself does not prevent the act from being within the course or scope of employment, and if the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is subject to liability if the act otherwise is within the service.

McNew v. Puget Sound Pulp & Timber Co., 37 Wn.2d 495, 497-98, 224 P.2d 627 (1950). Moreover, the court has rejected the notion that "breaking company . . . policy" renders an employee not within the scope of employment. *Dickinson v. Edwards*, 105 Wn.2d 457, 470, 716 P.2d 814 (1986). The *Dickinson* court observed that "'[a]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment.'" *Dickinson,* 105 Wn.2d at 470 (quoting *Restatement (Second) of Agency* § 230 (1958)). Accordingly, *Dickinson* held that an employer may be liable for the negligent acts of its employee, although such act "may be contrary to instructions." *Dickinson,* 105 Wn.2d at 470.

Likewise, in *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949), our Supreme Court dealt with a similar issue. Leber claimed it was not liable for its employee's negligence in causing a car accident, because the employee was driving in a manner contrary to the employer's instructions. *Smith*, 34 Wn.2d at 618, 622-23. The employee had been directed to return a rented vehicle. However, his supervisor became aware that the employee had been drinking and told him not to drive it. The employee drove the vehicle anyway and caused an accident. *Smith*, 34 Wn.2d at 616-18. The court found Leber liable, stating "'an employer is liable for acts of his employee within the scope of the latter's employment notwithstanding such acts are done in violation of rules, orders, or instructions of the employer.'" *Smith*, 34 Wn.2d at 623 (quoting 35 AM. JUR. *Master and Servant* § 559, at 993).

Contrary to the above noted cases, the State urges us to hold that an employer is not liable for injuries suffered by an unauthorized passenger that were caused by its employee. The State relies upon *Restatement (Second) of Agency* § 242 (1958) which states:

> A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.

But this section of the *Restatement* has never been adopted or even cited in a published appellate decision in this state.[2] The State acknowledges this, but contends that the rule is in accord with the earlier Washington cases of *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 P. 491 (1917), and *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917).

In *Gruber*, the employer, Cater Transport, was a business engaged in the transport of goods using both automobile and horse-drawn trucks. *Gruber*, 96 Wash. at 545. Gruber hired Cater Transport to move his household goods. Cater's driver allowed Gruber to ride on the cargo and Gruber was injured when he was ejected from the truck when it hit a bump in the road. The Supreme Court held that the driver was without authority to allow Gruber to ride with the cargo and therefore found in favor of Cater Transport. *Gruber*, 96 Wash. at 549-50.

Gruber is inapposite. It does not mention respondeat superior and does not meaningfully discuss scope of employment for present purposes. Moreover, the decision turns on two key facts not present here: first, that the vehicle at issue was obviously not meant to accommodate

[2] Notably, section 242 has no equivalent counterpart in *Restatement (Third) of Agency*, which the American Law Institute adopted in 2005 and published in 2006. *See* 2 RESTATEMENT (THIRD) OF AGENCY 488 (2006) ("PARALLEL TABLES").

passengers in its cargo area, and second, that the parties had contracted to carry cargo and not passengers. *See Gruber*, 96 Wash. at 546-49.[3]

In *McQueen*, the court considered the case of a delivery driver who chose to give two women a ride on the running board of his employer's vehicle. One of the women was injured when she either fell or jumped off the vehicle as it was moving. *McQueen*, 97 Wash. at 388. The Supreme Court held that the employee was not within the scope of his employment and his employer was not liable. *McQueen*, 97 Wash. at 390. Addressing whether the driver's invitation to the women to ride on the truck's running board fell within the scope of his employment, our Supreme Court stated:

> the act complained of must have been done while the servant was engaged in doing some act under authority from his master; not that, while engaged in the act, he is employed in the master's business; but the act must have been in the furtherance of the master's business and such as may be fairly said to have been either expressly or impliedly authorized by the master.

McQueen, 97 Wash. at 388-89. In other words, "the act causing the injury must pertain to the duties which the servant was employed to perform and is being done as a means or for the purpose of doing the work assigned him by the master." *McQueen*, 97 Wash. at 389.

The *McQueen* court held that in inviting the women to ride on the running board of the truck the driver was "not acting within the scope of his employment, there being no question that

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[3] We acknowledge that *Gruber* is later recharacterized in *McQueen* as holding that the driver of the truck had no real or apparent authority to allow or permit Gruber to ride upon the truck, "or, stated as a legal proposition, that the driver was not acting within the scope of his employment." *McQueen*, 97 Wash. at 390. Still, the circumstances of the *Gruber* case are significantly different than those of the present case, and the analysis employed in *Gruber* is simply not helpful here.

he had no authority to invite or permit persons to ride with him while delivering merchandise for [his employer]." *McQueen*, 97 Wash. at 389-90. The court reasoned as follows.

> In inviting the [women] to ride upon the truck, [the driver] was engaged in furthering his own pleasure and not in furthering his master's business. His employment was to drive the truck. In inviting these [women] to ride with him, he was neither doing it as a means nor for the purpose of performing that work. It had no connection with his work, either directly or indirectly. In extending this invitation, [the driver] was acting without any reference to the business in which he was employed. It was an independent and private purpose of his own contributing to his pleasure but not to his service. While so acting, he was his own master irrespective of the fact that the facilities afforded him to do his work were instrumental in inflicting the injuries complained of.

McQueen, 97 Wash. at 390.

McQueen's rationale would seem to apply here. Mohammad's conduct of taking his wife along on his business trip to Spokane as an unauthorized passenger in a state vehicle may be described as an independent and private purpose of his own contributing to his pleasure but not to his service. Nevertheless, *McQueen* is distinguishable from the present case because, unlike the driver in *McQueen*, Mohammad was clearly engaged in his employer's business—driving to Spokane—when the accident occurred. Mohammad did not detour from his employer's business.[4]

[4] The facts recited in the *McQueen* case suggest that the driver's purpose in driving his employer's truck across the street while the women sat on the truck's running board was to continue to conceal one of the women from her brother-in-law's view. *See McQueen*, 97 Wash. at 387-88. The case does not clearly state whether the driver was also in route to another delivery for his employer when so operating the truck, *see McQueen*, 97 Wash. at 387-88, but the court's analysis suggests that he was not. *See McQueen*, 97 Wash. at 389 ("so long as the thing the servant is doing is in the furtherance of the master's business, the master must answer for the manner in which the act is done").

Moreover, 20 years after *McQueen*, the Supreme Court in *Poundstone v. Whitney*, 189 Wash. 494, 65 P.2d 1261 (1937), relied in part on *McQueen* in affirming judgment against an employer for his employee's negligence in causing a car accident resulting in injuries. In *Poundstone*, the employees of a car dealership had been instructed to be on the lookout for prospective customers. The business owner had authorized a shop employee to drive the employer's automobile in a parade. The employee went out of his way to take a prospective customer to participate in the parade. On his way to pick up the prospect, the employee negligently injured third parties, to whom the employer was held liable. *Poundstone*, 189 Wash. at 495-99. The *Poundstone* court held that "[t]he fact that [the employee] was performing an unauthorized act does not defeat a recovery." *Poundstone*, 189 Wash. at 500. The *Poundstone* court opined that whether an employee, at the time the act was done for which the employer was sought to be held liable, was within the scope of his employment, depends upon whether the act had been expressly or impliedly authorized by the employer. *Poundstone*, 189 Wash. at 499. But additionally, "the employer is liable if the act complained of was incidental to the acts expressly or impliedly authorized or indirectly contributed to the furtherance of the business of the employer." *Poundstone*, 189 Wash. at 499 (citing cases including *McQueen*).[5]

Poundstone rejected the notion that an employee's actions contrary to his employer's instructions necessarily rendered the employee's conduct outside of his scope of employment.

[5] The dissent in *Poundstone* likewise relied in part on *McQueen* in arguing that the employer should not be held liable where the employee engaged in unauthorized acts without the knowledge or consent of his employer, thereby rendering his conduct outside the scope of his employment. *See Poundstone*, 189 Wash. at 504-05, 510 (Steinert, C.J., dissenting). But that view did not win the day.

Where an employee is "'about his master's business, but acting in a forbidden way,'" his disobedience "'[does] not place him outside of the scope of his employment.'" *Poundstone*, 189 Wash. at 501 (quoting *Loux v. Harris*, 226 Mich. 315, 197 N.W. 494, 495-96 (1924)). "'The master is responsible for the negligent acts or omissions of his servants in the course of their employment, though unauthorized or even forbidden by him, and although outside of their line of duty, and without regard to their motives.'" *Poundstone*, 189 Wash. at 502 (quoting *Luckett v. Reighard*, 248 Pa. 24, 93 A. 773, 775 (1915) (some internal quotation marks omitted)). *Poundstone* noted:

> If it were true that a servant is outside the scope of his employment whenever he disobeys the orders of his master, the doctrine of respondeat superior would have but scant application, for the master could always instruct his servant to use ordinary care under all circumstances. The servant's negligence would therefore always be contrary to orders, and the nonliability of the master would follow. But such is not the law. The servant is within the scope of his employment when he is engaged in the master's service and furthering the master's business, though the particular act is contrary to instructions.

Poundstone, 189 Wash. at 501 (emphasis omitted) (quoting *Smith v. Yellow Cab Co.*, 173 Wis. 33, 180 N.W. 125, 126 (1920)).

Moreover, as noted, our Supreme Court's subsequent decisions instruct that where the employee combines his own business with that of his employer, "the employer will be held responsible" for the employee's negligent conduct "unless it clearly appears that the employee could not have been directly or indirectly serving his employer." *McNew*, 37 Wn.2d at 497-98. Here, Mohammad was clearly serving his employer by driving to Spokane when his negligent driving caused the accident. Rizwana's presence as an unauthorized passenger did not change that. *Smith*, 34 Wn.2d at 623; *Dickinson*, 105 Wn.2d at 470. Accordingly, applying *McNew*,

Smith, Dickinson, and *Poundstone*, we hold that Mohammad was acting within the scope of his employment at the time of the accident, thereby rendering his employer vicariously liable for his negligence. We decline the State's invitation to adopt and apply *Restatement (Second) of Agency* § 242, because doing so would be contrary to *McNew*, *Smith, Dickinson,* and *Poundstone*.[6]

We additionally note that the California Supreme Court has applied the same rule quoted above from *McNew* in the unauthorized passenger context in *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 968-70, 719 P.2d 676, 680 (1986). Perez was injured while riding as an unauthorized passenger on a tractor driven by Garcia as Garcia performed his assigned task of disking his employer's orchard. Perez's injury occurred when a low branch knocked him off the tractor and onto the disk machinery being pulled by the tractor. The California Supreme Court held that the trial court erred in ruling that the issue of scope of employment was a question of fact for the jury in that case. The court observed that it was uncontroverted that at the time of the accident Garcia was driving his employer's tractor in his employer's orchards and was performing an assigned task during working hours. When Perez asked the court to instruct that Garcia was acting within the scope of his employment as a matter of law, the defendant (Garcia's employer) argued against the proposed instruction, claiming that Garcia violated company instructions by taking an unauthorized passenger and that Garcia's conduct benefited only Garcia

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[6] The State's reliance upon *Thompson v. Everett Clinic*, 71 Wn. App. 548, 860 P.2d 1054 (1993), *review denied*, 123 Wn.2d 1027 (1994), and *Kuehn v. White*, 24 Wn. App. 274, 600 P.2d 679 (1979), is also misplaced. These cases hold that a tort committed by an agent, even if committed while engaged in the employment of the principal, is not attributable to the principal if the conduct emanated from the agent's wholly personal motive and was done solely to gratify the agent's personal objectives or desires. *See Thompson*, 71 Wn. App. at 553; *Kuehn*, 24 Wn. App. at 278. These cases are distinguishable in that they address the issue of a principal's vicarious

and not Garcia's employer. As noted, the trial court ruled that the question of scope of employment was an issue of fact for the jury and instructed the jury accordingly. *Perez*, 41 Cal. 3d at 968-69, 719 P.2d at 679.

In holding that the trial court erred, the California Supreme Court opined that "[a]s long as it is clear that at the time of the injury the employee was following his employer's instructions to disk the orchard, the fact that he was not authorized to take a passenger is immaterial." *Perez*, 41 Cal. 3d at 969, 719 P.2d at 679. The *Perez* court relied on a prior California Supreme Court case in which the plaintiff's decedent had been killed in an accident when defendant's employee drove through a red light. As in the *Perez* case:

> [d]efendants argued that respondeat superior should not apply because the employee had no authority to invite passengers. We rejected that argument, stating: ". . . it is well known that employee-drivers often commit such breaches of duty by carrying unauthorized passengers, and so long as injury to the rider occurs while the driver is carrying out his employer's business, the employer must be held liable under the familiar principle of liability for a servant's torts committed as part of the transaction of the master's business, *even though the injury may accrue coincident with behavior contrary to the master's express orders*."

Perez, 41 Cal. 3d at 969, 719 P.2d at 679 (alteration in original) (quoting *Meyer v. Blackman*, 59 Cal. 2d 668, 679, 381 P.2d 916 (1963)). We find this application of the rule expressed in *McNew* to be persuasive.

We also reject the State's invitation to apply the law of trespass to affirm the trial court. Notably, the State's sparse discussion of Washington trespass law cites no case from this jurisdiction that applies trespass law in this context, and we decline to do so here.

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liability where an agent assaults a third party. Because the current case does not involve an intentional tort, *Thompson* and *Kuehn* are inapposite.

Finally, we decline the State's invitation to consider RCW 42.52.160 because the statute is not properly before us. On the eve of oral argument, the State filed a document entitled "Supplemental Certificate of Authority" asking this court to consider RCW 42.52.160 "on the issue of respondeat superior." See spindle (capitalization omitted, emphasis omitted). While a party may file a statement of additional authorities, *see* RAP 10.8, the present appeal concerns the trial court's summary judgment determination, to which RAP 9.12 applies. When reviewing an order granting or denying a motion for summary judgment, we will consider "only evidence and issues called to the attention of the trial court." RAP 9.12. *See also Sourakli v. Kyriakos, Inc.*, 144 Wn. App. 501, 509, 182 P.3d 985 (2008) (citing RAP 9.12 as basis for declining to consider argument not made to the trial court), *review denied*, 165 Wn.2d 1017 (2009); *Coronado v. Orona*, 137 Wn. App. 308, 318, 153 P.3d 217 (2007) (RAP 9.12 limits appellate court's review to issues brought to the trial court's attention). The State did not argue RCW 42.52.160 to the trial court. Accordingly, we decline to consider the State's "new" argument.[7]

CONCLUSION

We hold that the trial court erred in granting summary judgment to the State on the issue of vicarious liability. Because Mohammad was clearly engaged in his employer's business when

[7] Even if we were to consider the matter, we would hold that RCW 42.52.160 has no application here. The statute provides in relevant part that no state officer or employee may "employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another." RCW 42.52.160(1). The purpose of this statute is to ensure that state employees "do not waste official resources on personal business." *Clawson v. Grays Harbor College Dist. No. 2*, 148 Wn.2d 528, 545, 61 P.3d 1130 (2003). There is no allegation or evidence that Mohammad wasted state resources. He did not use the state vehicle for personal errands for himself or his wife, he simply permitted Rizwana to ride along with him to a scheduled business meeting in Spokane.

his negligence caused injury to Rizwana, Mohammad's employer, the Department of Ecology, is vicariously liable under the doctrine of respondeat superior as a matter of law. We reverse and remand with instructions to the trial court to enter partial summary judgment in favor of Rizwana on the issue of vicarious liability and for further proceedings consistent with this opinion.

Bridgewater, J.

We concur:

Armstrong, J.

Penoyar, A.C.J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

RIZWANA RAHMAN, Appellant, v. STATE OF WASHINGTON, Respondent, v. MOHAMMAD SHAHIDUR RAHMAN, individually and MOHAMMAD SHAHIDUR RAHMAN and RIZWANA RAHMAN, as a marital community, Third Party Defendants.	No. 37327-1-II ORDER DENYING MOTION FOR RECONSIDERATION

On June 15, 2009, the respondent State of Washington filed a "Motion for Reconsideration or in the Alternative Motion to Unpublish."

We deny the motion in its entirety.

IT IS SO ORDERED.

DATED this 25th day of June, 2009.

Penoyar, ACJ

Penoyar, A.C.J.

APPENDIX C

RCW **42.52.160. Use of persons, money, or property for private gain**

(1) No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

(2) This section does not prohibit the use of public resources to benefit others as part of a state officer's or state employee's official duties.

(3) The appropriate ethics boards may adopt rules providing exceptions to this section for occasional use of the state officer or state employee, of de minimis cost and value, if the activity does not result in interference with the proper performance of public duties.